Supreme Court, U.S.
FILED
OCT 2 1979
MICHAEL RODAK, JR., CLERK

No. 79-249

In the Supreme Court of the United States

OCTOBER TERM, 1979

LESTER GENSER AND LAWRENCE FORMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-249

LESTER GENSER AND LAWRENCE FORMAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In .his criminal income tax case, petitioners seek to set aside their convictions on the ground that the trial court's failure to suppress evidence obtained from third parties pursuant to Internal Revenue summonses, where each summons was found to have been issued for civil purposes, conflicts with *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of conspiracy to evade personal and corporate income tax, in violation of 18 U.S.C. 2 and 371, and evasion of personal and corporate income tax, in violation of 26 U.S.C. 7201 and 7206(1) (Pet. App. A8). The district court sentenced Genser to a total prison term of eight

years and imposed fines totalling $135,000 (Pet. App. A2). If sentenced Forman to an eight year term and imposed fines totalling $130,000 (Pet. App. A5).

1. At trial, petitioners moved to suppress evidence summoned by agents of the Internal Revenue Service from third parties on the ground that the summonses were improperly issued (Pet. App. A16-A18). The summonses in question had been voluntarily complied with and no enforcement proceedings had been instituted (Pet. App. A25). The district court refused to hold a hearing, finding that petitioners lacked standing to seek suppression because the evidence was obtained from third parties. See *United States* v. *Miller*, 425 U.S. 435 (1976) (Pet. App. A20). The court of appeals concluded that petitioners had standing and remanded the case to the district court "with instructions to conduct an evidentiary hearing" in light of petitioners' "allegations of governmental impropriety" (Pet. App. A42).[1]

On remand, the district court addressed the question whether the summonses were issued "solely [for] criminal purposes" within the meaning of this Court's decision in *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316. After the hearing at which the issuing special agent and the Assistant Regional Counsel who had handled the case testified, the district court found that petitioners had failed to establish that at the time the summonses were issued, the Internal Revenue Service "had either already

[1]We believe that the court of appeals erred in holding that petitioners had standing to challenge the use of evidence obtained from third parties and that this aspect of its decision conflicts with *United States* v. *Miller*, *supra*, and *United States* v. *Sand*, 541 F. 2d 1370, 1374 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977). However, the affirmance of petitioners' convictions made it unnecessary for us to seek review of this ruling as to standing.

referred the matter to the United States Department of Justice or had itself determined that it was interested solely in the criminal tax aspects of the matter," and that the Internal Revenue Service's "investigation into * * * [petitioners'] civil tax liability did not terminate even with the bringing of the indictment, but continued thereafter" (Pet. App. A54-A55).

With one judge dissenting, the court of appeals again remanded the case to the district court for further findings (Pet. App. A58-A73). In analyzing the Court's decision in *United States* v. *LaSalle National Bank*, *supra*, the court of appeals found that "the existence of a general civil purpose for the investigation [does not] terminate judicial inquiry. * * * [U]nder *LaSalle*, we must focus on the purposes of individual summonses and not on the purpose of the investigation as a whole " (Pet. App. A65). The court recognized that such an inquiry was not necessary in every case. In discussing the cases where such an inquiry would be necessary, the court observed (Pet. App. A67):

> More suspect, of course, would be those summonses issued after an agent has recommended prosecution. Even in the case of such a summons, however, the taxpayer would bear the burden of proving both a pre-existing institutional commitment to prosecute and a failure of the summons to advance any civil purpose. The IRS, on the other hand, could deflect such a challenge simply by demonstrating that each summons issued after the agent's recommendation did, in fact, have a civil purpose.

The court of appeals found that the district court had failed to consider petitioners' claim that, prior to the formal recommendation for prosecution by the Internal Revenue Service to the Department of Justice before December 12, 1975 (Pet. App. A68), the Internal Revenue

Service, "as an institution, had committed itself * * * to refer the case for prosecution and that summonses issued after that commitment serve no civil purpose." The court of appeals further suggested that the district court should inquire into whether the issuing agent had delayed submitting his report recommending prosecution (Pet. App. A70).

The district court thereafter held a further hearing at which the issuing agent again testified. After the hearing, the court found "that each one of * * * [the summonses issued] was useful and intended to be useful and was issued for a civil purpose; namely the computation of the tax due and owing from Genser, Forman and from Genser-Forman" (Pet. App. A77). The court further found "that there was no extraordinary delay of any kind. Indeed * * * there not only was no inordinate delay but * * * the investigation proceeded very rapidly * * *" (*ibid.*). The court of appeals affirmed. It held the district court's findings that there was a civil purpose for the issuance of each summons and that there were no inordinate delays in the investigation "are not clearly erroneous" (Pet. App. A86).

2. Petitioners contend (Pet. 11) that under the Court's decision in *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 317, if the Internal Revenue Service has made an "institutional commitment" to refer a case to the Department of Justice with a recommendation that a taxpayer be criminally prosecuted, its agents cannot issue a third party summons in pursuit of their continuing investigation of the civil liability.

This argument misreads *LaSalle* and, at all events, has no basis in the record. Here, the summonses were issued long before there was any recommendation for prosecution from the Internal Revenue Service to the Department

of Justice. Moreover, after two evidentiary hearings, the district court found "that each one of the questioned summonses in this case was issued for a civil purpose" (Pet. App. A77). Thus, the district court's refusal to suppress the summoned records was entirely in accord with *LaSalle National Bank*.

Petitioners contend that even if there is a valid civil purpose for a summons, once there is an institutional commitment by the Internal Revenue Service to prosecute, all summonses issued are improper. In support of this argument, they cite the Court's statement in *LaSalle* that it would be improper for the Service to delay its recommendation to the Department of Justice "when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosectuion" (437 U.S. at 317). But if, as the district court found in this case, there is a valid civil purpose, the purpose for the issuance of the summons would not be merely "to gather additional evidence for the prosecution."

At all events, there is no factual basis for petitioner's assertion that the Service had an institutional commitment to refer the case for prosecution or that it delayed in sending the case to the Department of Justice. During the second remand hearing, the district court expressed its belief that once an agent knows of $10 million of deficiencies, the Service has "a pretty good commitment to prosecute" (see Pet. 8). It is quite clear, however, from *LaSalle*, that this Court's reference to an "institutional commitment" did not depend on an agent's commitment, but rather, at a minimum, required the concurrence of "the officials of at least two layers of review" (437 U.S. at 315). There is no showing here that the agent, prior to submitting his report, had even communicated with any

of his reviewing superiors with respect to his investigation. Moreover, as the district court noted, "there was no delay whatsoever occasioned for a criminal purpose" (Pet. App. A77). Petitioners do not contest this finding; rather, they complain (Pet. 3) that they were denied an opportunity to establish the institutional commitment. But they neglect to point out that at the first remand hearing, the staff assistant of Regional Counsel in charge of processing criminal cases to the Department of Justice was called as a witness and petitioners declined to cross-examine him. There is accordingly no factual basis to support petitioner's claim that the Service had an institutional commitment to prosecute him and that it delayed the referral of the case to gather additional evidence for the prosecution.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10